

6
No. 93-517

Supreme Court, U.S.
FILED

JAN 21 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

BOARD OF EDUCATION OF KIRYAS JOEL
VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET, et al.,

Respondents.

On Writ Of Certiorari To The
Court Of Appeals Of New York

**BRIEF OF THE KNIGHTS OF COLUMBUS AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

Of Counsel:

W. PATRICK DONLIN
CARL A. ANDERSON
KNIGHTS OF COLUMBUS
One Columbus Plaza
New Haven, CT 06510
(203) 772-2130

WILLIAM P. BARR*
MICHAEL A. CARVIN
WILLIAM L. McGRATH
SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Counsel of Record

TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF THE AMICUS CURIAE..... | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 2 |
| ARGUMENT..... | 5 |
| I. THE NEW YORK STATE LEGISLATURE'S ENACTMENT OF CHAPTER 748 WAS A PER- MISSIBLE ACCOMMODATION OF THE RELI- GIOUS PRACTICES AND BELIEFS OF THE SATMAR HASIDIC RESIDENTS OF KIRYAS JOEL | 5 |
| II. THE COURT OF APPEALS OF NEW YORK ERRED IN HOLDING THAT CHAPTER 748 VIOLATES THE ESTABLISHMENT CLAUSE ABSENT A SHOWING THAT THE STATUTE INVOLVES GOVERNMENT COERCION OF PRIVATE RELIGIOUS CHOICES..... | 14 |
| CONCLUSION | 22 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|--|--------------|
| <i>Aguilar v. Felton</i> , 473 U.S. 402 (1985)..... | 2, 21 |
| <i>Board of Educ. of Westside Community Schools v. Mergens</i> , 496 U.S. 226 (1990)..... | 13 |
| <i>Bowen v. Kendrick</i> , 487 U.S. 589 (1988) | 13 |
| <i>Bowen v. Roy</i> , 476 U.S. 693 (1986) | 15 |
| <i>Braunfeld v. Brown</i> , 366 U.S. 599 (1961)..... | 7 |
| <i>Burnet v. Coronado Oil Gas Co.</i> , 285 U.S. 393 (1932) | 21 |
| <i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)..... | 20 |
| <i>Committee for Public Educ. v. Nyquist</i> , 413 U.S. 756 (1973)..... | 20 |
| <i>Corporation of Presiding Bishop v. Amos</i> , 483 U.S. 327 (1987)..... | 7, 8, 11, 21 |
| <i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (1989) | 16, 19 |
| <i>Employment Div., Dept. of Human Resources of Oregon v. Smith</i> , 494 U.S. 872 (1990)..... | 6, 9, 15 |
| <i>Engel v. Vitale</i> , 370 U.S. 421 (1962) | 20 |
| <i>Estate of Thornton v. Caldor</i> , 472 U.S. 703 (1985) .. | 11, 15 |
| <i>Everson v. Board of Educ.</i> , 330 U.S. 1 (1947) | 17, 19 |
| <i>Gillette v. United States</i> , 401 U.S. 437 (1971) | 7 |
| <i>Grumet v. Board of Educ.</i> , 81 N.Y.2d 518 (1993) .. | 6, 9, 12 |
| <i>Hobbie v. Unemployment Appeals Comm'n of Florida</i> , 480 U.S. 136 (1987)..... | 4, 8 |
| <i>Lamb's Chapel v. Center Moriches School Dist.</i> , 113 S. Ct. 2141 (1993) | 7, 14 |

TABLE OF AUTHORITIES – Continued

Page

| | |
|--|---------------|
| <i>Lau v. Nichols</i> , 412 U.S. 938 (1973) | 12 |
| <i>Lee v. Weisman</i> , 112 S. Ct. 2649 (1992)..... | <i>passim</i> |
| <i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)..... | <i>passim</i> |
| <i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984) | 6 |
| <i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)..... | 21 |
| <i>McCullum v. Board of Education</i> , 333 U.S. 203 (1948) | 20 |
| <i>McDaniel v. Paty</i> , 435 U.S. 618 (1978)..... | 8, 10 |
| <i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)..... | 7, 11 |
| <i>Meek v. Pittenger</i> , 421 U.S. 349 (1975) | 11 |
| <i>Mueller v. Allen</i> , 463 U.S. 388 (1983)..... | 7 |
| <i>Payne v. Tennessee</i> , 111 S. Ct. 2597 (1991) | 21 |
| <i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 112 S. Ct. 2791 (1992) | 20, 21 |
| <i>School Dist. of Abington v. Schempp</i> , 374 U.S. 203 (1963) | 13 |
| <i>School Dist. of the City of Grand Rapids v. Ball</i> , 473 U.S. 373 (1985) | 2, 3, 11, 21 |
| <i>Selective Draft Law Cases</i> , 245 U.S. 366 (1918) | 7 |
| <i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)..... | 8, 15 |
| <i>Thomas v. Review Bd. of Indiana Employment Sec. Div.</i> , 450 U.S. 707 (1981)..... | 8, 15, 20 |
| <i>TWA v. Hardison</i> , 432 U.S. 63 (1977) | 11, 15 |
| <i>United States v. Lee</i> , 455 U.S. 252 (1982)..... | 7 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|---------------|
| <i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985) | <i>passim</i> |
| <i>Walz v. Tax Comm'n of the City of New York</i> , 397 U.S. 664 (1970)..... | 7, 8, 13 |
| <i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972) | 12 |
| <i>Witters v. Washington Dept. of Services for Blind</i> , 474 U.S. 481 (1986) | 7 |
| <i>Zobrest v. Catalina Foothills School Dist.</i> , 113 S. Ct. 2462 (1993)..... | 7 |
| <i>Zorach v. Clauson</i> , 343 U.S. 306 (1952)..... | 7, 13, 20 |
| LEGISLATIVE HISTORY | |
| 1 <i>Annals of Congress</i> (J. Gales ed. 1789)..... | 18 |
| 1 <i>Annals of Congress</i> (J. Gales ed. 1834)..... | 9 |
| STATUTES | |
| 12 Hening's Stat. 86 (W. Hening ed. 1823)..... | 18 |
| Chapter 748 of the Laws of 1989 | <i>passim</i> |
| Religious Freedom Restoration Act, P.L. 103-141, 107 Stat. 1488 (1993)..... | 6 |
| OTHER | |
| 8 <i>The Papers of James Madison</i> (1973) | 17, 18 |
| M. McConnell, <i>Accommodation of Religion</i> , 1985 S. Ct. Rev. 1 | 6, 9, 11, 13 |
| L. Levy, <i>The Establishment Clause</i> (1986)..... | 17 |
| L. Tribe, <i>American Constitutional Law</i> (2d ed. 1988) | 9 |

No. 93-517

In The
Supreme Court of the United States
October Term, 1993

BOARD OF EDUCATION OF KIRYAS JOEL
VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET, et al.,

Respondents.

On Writ Of Certiorari To The
Court Of Appeals Of New York

BRIEF OF THE KNIGHTS OF COLUMBUS AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Knights of Columbus is an international Catholic fraternal organization of 1.5 million members dedicated to advancing the ideals of charity, unity, fraternity, and patriotism through its activities around the world. While the Knights of Columbus engages in a broad range of social action programs aiding the sick, the handicapped, and the less fortunate, it and its membership also have an abiding interest in celebrating and preserving our country's rich and diverse religious heritage. Toward that end, *amicus* actively supports governmental actions that seek to further, within the framework established by the Religion Clauses of the First Amendment, the religious liberty of all citizens.

Because this case squarely raises the issue of what actions government may take to accommodate religious

beliefs and practices, its resolution is of utmost importance to *amicus* and its members, and so *amicus* submits this brief to assist the Court's deliberations.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court held, in the companion cases of *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) and *Aguilar v. Felton*, 473 U.S. 402 (1985), that it is unconstitutional for public school teachers to teach children on the grounds of private religious schools, an obvious and seemingly uncontroversial solution presented itself: since it is impermissible to send public school teachers into private schools, then the private school students would have to be sent into public schools. For the disabled Satmar Hasidic children living in the Village of Kiryas Joel in New York State, however, the option of attending public school for their special educational needs proved not to be an acceptable one. These disabled children, like all Satmar Hasidim, were accustomed to the insular Satmar environment that the devoutly orthodox tenets of that faith require. Accordingly, when these children left Kiryas Joel to attend the public schools in neighboring towns, they were traumatized by the exposure to other (*i.e.*, non-Satmar) school children who attended those schools.

Rather than force these children and their parents to confront the unpalatable choice of, on the one hand, continuing to expose the children to this trauma in a manner that violates certain core beliefs and practices of their faith, or, on the other hand, foregoing the children's right to a free and appropriate public education, the New York State Legislature took the salutary step of creating a new public school district coterminous with the Village of Kiryas Joel. With the enactment of Chapter 748 of the Laws of 1989 ("Chapter 748"), the Board of Education of the Kiryas Joel Village School District

¹ In accordance with Rule 37 of the Rules of this Court, and pursuant to the stipulation between Petitioner and Respondents, Petitioner's letter of consent is being filed concurrently with this brief.

was empowered to establish public schools within Kiryas Joel. As a result, the disabled children of Kiryas Joel can now attend public school with other Satmar Hasidic children in an environment that, while wholly (and undisputedly) secular, nonetheless comports with the requirements of their faith.

The Legislature achieved this beneficial result, moreover, without inconveniencing nonbelievers in the slightest. No person was compelled to provide financial support for religious activities, to be exposed to religious symbols or statements, or in any way to modify or compromise the public education provided to any student. In the absence of any cognizable ground for non-Satmar persons to complain about exposure to or support for a religious message, it is difficult to perceive how New York's efforts to foster religious pluralism could run afoul of constitutional guarantees designed to achieve precisely that end. Indeed, since Chapter 748 merely facilitates the Satmar Hasidim's desire to be left alone to pursue their religion absent external interference – the same desire that inspired many persecuted groups to found this Nation and the Constitution – Chapter 748 furthers the Religion Clauses' core purpose of protecting minority religious sects against secular coercion.

The New York Court of Appeals nonetheless found that the law violates the Establishment Clause. The Court did not trace the constitutional infringement to any alleged "effect" on the secular activities or religious beliefs of any identified individual; it rested solely on the "symbolic" effect of the statute. Specifically, the lower court, applying the three-part "test" announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and relying especially upon language from this Court's decision in *Grand Rapids*, ruled that Chapter 748 on its face creates an impermissible "symbolic union of church and State," the "principal or primary effect" of which is "to advance religious beliefs" in contravention to the second prong of *Lemon*.

In urging this Court to reverse the Court of Appeals' decision, *amicus* will make two main arguments. First, the

Court of Appeals' novel application of *Lemon* is flatly inconsistent with this Court's longstanding recognition that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987). The Court should use this occasion to remind the lower federal and state courts that between the constitutional demands of the Free Exercise Clause and the constitutional prohibitions of the Establishment Clause, there is a wide scope for legislative discretion within which governmental entities may act to further the religious liberty of citizens by accommodating their religious beliefs and practices. Chapter 748 falls squarely within this zone.

Moreover, and this is *amicus*' second major point, the Court of Appeals' reliance on Chapter 748's alleged "symbolic" effect reinforces the importance of returning to this Court's Establishment Clause jurisprudence the inquiry as to whether a challenged governmental action involves governmental coercion of private religious choices. While *amicus* is aware that the Court is divided on the question of whether coercion is a necessary element of an Establishment Clause violation, we respectfully submit that the historical record clearly shows that, simply put, there can be no "establishment of religion" absent a showing that the government has acted to coerce or induce private religious choices. Moreover, neither stray statements in some of this Court's decisions, nor the requirements of *stare decisis*, justify failing to reestablish the role of coercion in Establishment Clause jurisprudence.

In this case, there simply can be no allegation that the government is involved in coercing or compelling any individual's private religious choices. On the contrary, Chapter 748 effectively liberates the disabled Satmar school children, their families, and the other residents of Kiryas Joel to practice their religion to its fullest, and it does so in a manner that does not have any impact whatsoever on any other citizens. This very practical and benevolent effect of accommodating the beliefs and practices of the Satmar Hasidim far outweighs

any ephemeral "symbolic" effect Chapter 748 may have on either the Satmar Hasidim or other citizens.

ARGUMENT

I. THE NEW YORK STATE LEGISLATURE'S ENACTMENT OF CHAPTER 748 WAS A PERMISSIBLE ACCOMMODATION OF THE RELIGIOUS PRACTICES AND BELIEFS OF THE SATMAR HASIDIC RESIDENTS OF KIRYAS JOEL.

The enactment of Chapter 748 was an effort by the elected officials of New York State to accommodate the religious practices and beliefs of the Satmar Hasidim. The effect of this accommodation was to permit those citizens both to practice their religion in full accordance with its tenets, and to continue to receive valuable and important educational benefits. Absolutely no one was harmed or inconvenienced in the least by Chapter 748. This accommodation thus had the commendable effect of furthering the cause of religious liberty.

The Court of Appeals of New York, however, struck down Chapter 748 on a facial challenge, on the ground that the "principal or primary" effect of that statute was to advance religion by creating a "symbolic union" of church and state.² *Amicus* will argue below that an Establishment Clause violation requires proof of governmental coercion, but even accepting the *Lemon* test as it is now formulated, the lower court's decision cannot stand. For *Lemon*, like the Establishment Clause itself, was designed to further "[o]ur aspiration to religious liberty, [which is] embodied in the First Amendment." *Lee v. Weisman*, 112 S. Ct. 2649, 2676 (1992)

² Because this case arises in the context of a facial challenge to Chapter 748, there has been no allegation of impermissible religious sponsorship in the administration of the schools in the Kiryas Joel Village School District. Rather, the alleged violation is premised upon the mere creation of the school district.

(Souter, J., concurring).³ Any application of that test that leads a court to invalidate a governmental action that so manifestly enhances religious liberty must, accordingly, be an erroneous one.

The fundamental flaw with the Court of Appeals' decision was its failure to temper *Lemon's* "effects" prong with this Court's recognition that its "precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). This Court's precedents, in turn, merely reflect the fact that the purpose of the Religion Clauses is to promote religious liberty. Accordingly, the Court of Appeals' observation that the "principal or primary effect of chapter 748 . . . is to enhance religious beliefs," *Grumet v. Board of Educ.*, 81 N.Y.2d 518, 529 (1993), is a manifestly inadequate basis for finding a violation of the Establishment Clause.

First of all, precisely the same words could be used to describe the *Free Exercise Clause* itself. The unequivocal purpose and effect of that provision is to "enhance religious beliefs" by ensuring that religious observers have the right to pursue the dictates of their conscience.⁴ For this reason, as

³ See also Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 1 ("It is sometimes forgotten that religious liberty is the central value and animating purpose of the Religion Clauses of the First Amendment. . . . Both free exercise and nonestablishment directly protect religious liberty: the government may not interfere with a person's chosen religious belief and practice by prohibiting it or by exerting power or influence in favor of any faith.").

⁴ For the same reason, the Court of Appeals' rationale, if allowed to stand, would seem necessarily to invalidate the recently-enacted Religious Freedom Restoration Act ("RFRA"), P.L. 103-141, 107 Stat. 1488 (1993), which codifies this Court's Free Exercise Clause jurisprudence prior to *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Under RFRA, no governmental entity may impose a burden upon the free exercise of religion unless the challenged measure is the least restrictive means of achieving a compelling state interest. Following the Court of Appeals' wooden application of *Lemon's* "effect" prong, a strong argument could be made that RFRA – a statute of unquestioned

this Court has often admonished, *Lemon* does not condemn legitimate governmental efforts to accommodate religious organizations or practices.⁵ These cases reflect the fact that "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (emphases in original).

Indeed, this Court has repeatedly held that the Free Exercise Clause *requires*, for example, state governments to provide unemployment benefits to persons whose religious beliefs or practices prevent them from working. See, e.g.,

constitutional pedigree – unconstitutionally "advances" religion in violation of the Establishment Clause.

⁵ Among the many cases in which the Court has held that either lifting a burden on the practice of religion or exempting religion from generally applicable laws does not violate the Establishment Clause are the following: *Waltz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 673 (1970) (property tax exemptions for religious organizations); *Corporation of the Presiding Bishop*, 483 U.S. at 327 (religious organization exemption of Title VII); *Gillette v. United States*, 401 U.S. 437 (1971) (exemption of religious objectors to compulsory military service); *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918) (exemption from draft for religious objectors); *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993) (funds provided under the Individuals with Disabilities Education Act spent at Catholic school); *Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141 (1993) (church permitted to use public school facilities to show religious films); *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481 (1986) (vocational assistance to blind person studying at private Christian college); *Zorach v. Clauson*, 343 U.S. 306 (1952) (off-premises public school release time programs); *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax credits); *United States v. Lee*, 455 U.S. 252, 260 & n.11 (1982) (indicating approval of statute exempting religious objectors from obligation to pay social security taxes); *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (plurality opinion) (indicating that Sabbatarian exception to Sunday closing laws is constitutional); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing laws).

Sherbert v. Verner, 374 U.S. 398 (1963); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987). The government may not, consistent with the First Amendment's guarantee of religious liberty, put a citizen to the choice of "following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Thomas*, 450 U.S. at 716-17 (quoting *Sherbert*, 374 U.S. at 404). Here, the disabled Satmar children of Kiryas Joel and their parents were, prior to the enactment of Chapter 748, confronted with the choice of sending the children to public schools in neighboring towns, thereby exposing them to significant trauma and inevitably threatening to undermine the requirements of their strictly orthodox faith, or surrendering their right to a free and appropriate public education. "Where the state . . . denies [an important] benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 717-18.

Amicus does not contend that Chapter 748 was compelled by the Free Exercise Clause. But the fact that it was not required does not mean that it was not permitted, for "[i]t is well established . . . that '[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.' " *Corporation of Presiding Bishop*, 483 U.S. 327 (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 673 (1970)).⁶ This Court in *Walz* called it "room for play in the joints," while Judge Bellacosa prefers Professor Tribe's

⁶ See also *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) ("[T]he interrelationship of the Religion Clauses has permitted government to take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish.").

phrase, "a zone of permissible accommodation," *Grumet*, 81 N.Y.2d at 558 (Bellacosa, J., dissenting) (quoting Tribe, *American Constitutional Law* § 14-7 at 1194 (2d ed. 1988)), but whatever we call it, there is, between the affirmative mandate of the Free Exercise Clause and the prohibitions of the Establishment Clause, room for government to act in furtherance of the First Amendment's ultimate goal of securing religious liberty.⁷

The need to acknowledge the legitimacy of governmental accommodations beyond those required under the Free Exercise Clause takes on special urgency in light of this Court's holding in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court ruled that there can be no violation of the Free Exercise Clause "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid [law]." *Id.* at 877.

The combined operation of *Smith* and *Lemon* (as *Lemon* was interpreted by the lower court) is to create a pincer movement that all but eviscerates the First Amendment's guarantee of religious liberty. If, under *Smith*, government has no *obligation* to exempt religious practices from generally applicable burdens, then *any* relaxation of a general burden for religious observers necessarily goes beyond Free Exercise mandates and, under the Court of Appeals' reasoning, is

⁷ Professor McConnell has uncovered a compelling bit of history that demonstrates this point well. See McConnell, 1985 Sup. Ct. Rev. at 22. As originally drafted, the Second Amendment included a provision stating that "no person religiously scrupulous shall be compelled to bear arms." Representative Benson opposed the clause, stating that he had "no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion." While Benson's motion to strike the clause was defeated by a vote of 24-22, the Senate rejected the religious exemption, and it was deleted in conference. *Id.* (quoting 1 *Annals of Congress* 778-80 (J. Gales ed. 1834)). It thus appears that the First Congress believed that the Legislature would have the discretionary authority to grant religion-based exemptions from generally applicable requirements.

therefore condemned under the Establishment Clause. Thus, for example, an exemption from a general prohibition on liquor (or minimum age drinking laws) to permit the use of sacramental wine at a Catholic Mass would violate the Establishment Clause because it advances religious liberty to a greater extent than is required by the Free Exercise Clause. Accordingly, absent explicit recognition that government accommodations may exceed Free Exercise mandates, a governmental attempt to alleviate a burden on religion is *never permitted under the Establishment Clause* because *never required under the Free Exercise Clause*.

If religious liberty is to maintain any vitality, then, government must be able, within the parameters set by the Establishment Clause, to accommodate religious practices and beliefs.⁸ We note initially that Chapter 748 is plainly such an effort at accommodation because it "lift[s] a discernible burden on the free exercise of religion." *Lee*, 112 S. Ct. at 2677 (Souter, J., concurring); *see also Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring). While requiring the disabled Satmar children to attend public school in the Monroe-Woodbury School District did not directly trample an explicit tenet of their religion, it unquestionably undermines the communal and separatist life-style of their orthodox faith. An exemption need not remove a burden on a particular religious tenet to be viewed as a permissible accommodation; it may simply be designed to eliminate less direct barriers that are inconsistent with an "atmosphere in which voluntary religious exercise may flourish." *McDaniel*, 435 U.S. at 638-39 (Brennan, J., concurring).

For example, Title VII's exemption of religious organizations was not needed to avoid direct confrontation with religious beliefs; it was simply designed to enhance religious organizations' autonomy from governmental interference.

⁸ This doctrine takes on ever greater importance as government plays an ever-expanding role in our society. Consequently, occasions where the beliefs and practices of religious institutions and individuals conflict with other societal interests are plentiful and growing.

Corporation of Presiding Bishop, 483 U.S. at 327. Similarly, while the Sunday closing laws did not violate the religious scruples of the plaintiffs in *McGowan v. Maryland*, this Court nonetheless made clear that changing these laws would be permissible, even desirable, under the Establishment Clause. 366 U.S. 420 (1961). Accordingly, it is well established that "accommodation is not confined to duties or obligations in the strictest sense." *McConnell*, 1985 Sup. Ct. Rev. at 27.

To be sure, the Court's cases do not precisely demarcate the boundary between permissible accommodation and impermissible "fostering of religion." *See Wallace*, 472 U.S. at 82 (O'Connor, J., concurring). The accommodation at issue here, however, is plainly permissible because it has *none* of the features of laws that might give rise to legitimate concerns about "excessive" accommodation. First, the law does not compel nonbelievers to subsidize religious activity in a pervasively sectarian setting. *See, e.g., Meek v. Pittenger*, 421 U.S. 349 (1975); *Aguilar*, 473 U.S. 402. The only funds going to the public schools in Kiryas Joel are funds to which those students are entitled by law, and they are being directed, moreover, to schools that are pervasively secular.

Nor does Chapter 748 create any inconvenience or disruption in the lives of nonbelievers or members of different faiths. Some religious accommodations may effectively operate as religiously-based preferences to certain benefits – such as excused work absences – to which others would be entitled absent the accommodation. The perceived evil in the Sabbath observance law struck down in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), for example, was that it forced other workers to cover for Sabbath observers. *Id.* at 709; *see also TWA v. Hardison*, 432 U.S. 63 (1977). In this case, by contrast, no teacher or student in Monroe-Woodbury School District (or anyone else) is affected or inconvenienced by Chapter 748. Finally, no activity in the Kiryas Joel involves any religious practice or symbol, so there is no possible danger of any non-Satmar person being offended or influenced by any governmental involvement, endorsement, or entanglement with any religious message. *See, e.g., Lee*, 112 S. Ct. at 2661; *Grand Rapids*, 473 U.S. at 386-90.

The lower court nonetheless found troubling two aspects of New York's enlightened effort to minimize interference with the Satmar Hasidim's religious faith. The Court of Appeals viewed Chapter 748 as defective because it "was designed to confer a benefit on a particular religious group." *Grumet*, 81 N.Y.2d at 536 (Kaye, C.J., concurring); *see also id.* at 531 ("the Legislature may not treat the Satmarer community as separate, distinct and entitled to special accommodation."). This is purely circular reasoning. The fact that only members of the Satmar sect benefit from this accommodation is but a concomitant of the fact that only the Satmar have a special need for this accommodation. The fact that accommodating separatist religious tenets benefitted only the Amish in *Yoder* created no Establishment Clause concerns. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). Similarly, an exemption for sacramental wine is not suspect because only one or a few religions have such a practice and are thus in need of such an exemption. Indeed, to say that government may relieve burdens imposed upon religion except where those burdens fall uniquely or disproportionately on one (or only a few) religious group would effectively nullify the government's ability to accommodate religion altogether.⁹

The Court of Appeals' final, related objection to Chapter 748 is that it creates a "symbolic union" between church and state that is "likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by non-adherents as a disapproval of their individual religious choices." *Grumet*, 81 N.Y.2d at 529. Notwithstanding such

⁹ In other contexts, there could be no claim of improper "discrimination" or preferential treatment when governmental action benefits only those groups whose special needs give rise to the action. It is, for example, entirely permissible (and even required) for the government to provide bilingual instruction to non-English speaking students. *See Lau v. Nichols*, 412 U.S. 938 (1973). That these programs benefit only members of certain ethnic groups is not ethnic discrimination, but merely reflects the fact that only those groups require the offered benefits. Likewise, the fact that only the Satmar Hasidim (and other similarly-situated sects) would benefit from a law like Chapter 748 is hardly a defect.

hyperbolic rhetoric, all the New York State Legislature has done by enacting Chapter 748 is enable the Satmar Hasidim of Kiryas Joel to maintain their faith without having to forego the right of their disabled children to important educational benefits. Such enlightened efforts to further religious diversity and liberty constitute an illicit "symbolic union" only if the Establishment Clause mandates "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *School Dist. of Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

Chapter 748 no more "endorses" the Satmar faith than exemption from compulsory military service "endorses" pacifism. Rather, the statute "endorses" only the view that individuals should be able to practice their religion in accordance with the dictates of their faith, without unnecessary pressure or penalty from the ever-increasing demands of a secular state. That such an endorsement does not convey an impermissible message is amply demonstrated by this Court's numerous decisions upholding similar accommodations and far stronger "symbolic unions" than that created by Chapter 748. *See Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 246-47 (1990) (Equal Access Act does not create impermissible "symbolic union" between church and state); *Bowen v. Kendrick*, 487 U.S. 589, 612-15 (1988) (same regarding Adolescent Family Life Act); *see also Walz*, 397 U.S. 664. As one scholar has aptly summarized the matter, "[w]hen rendering to God and rendering to Caesar are in irreconcilable conflict, it does not offend a proper notion of separation of church and state for Caesar to recede when he can conveniently do so." McConnell, 1985 Sup. Ct. Rev. at 26.

Indeed, the New York State Legislature's act of tolerance and pluralism, far from deserving censure, "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). We are confident that New York may take such action without raising undue concern among non-Satmar persons that their own religious views have received official "disapproval" or will be subjugated to the demands of this small and harmless sect.

II. THE COURT OF APPEALS OF NEW YORK ERRED IN HOLDING THAT CHAPTER 748 VIOLATES THE ESTABLISHMENT CLAUSE ABSENT A SHOWING THAT THE STATUTE INVOLVES GOVERNMENT COERCION OF PRIVATE RELIGIOUS CHOICES.

While the decision below is wholly antithetical to the language, history, and underlying purpose of the Establishment Clause, it is not, in candor, inconsistent with the literal commands of *Lemon* itself. All accommodations of religion, including the statute challenged here, have both the purpose and effect of "advancing" or "fostering" religion, in the sense that they relieve burdens from religious observers that would exist absent the accommodations. Applied literally, then, *Lemon* would prohibit all religious accommodation, a result that cannot be squared with subsequent decisions, the libertarian premises of the Religion Clauses, or the very existence of the Free Exercise Clause. Accordingly, *Lemon* and its progeny establish an analytical framework in which all government programs easing burdens on religious observance are presumptively unconstitutional because of the religious taint, although that presumption may be overcome if the government program fits within the ill-defined "accommodation" exception and does not otherwise create a "symbolic union" or "entanglement" between church and state.

This awkward analysis, as numerous members of the Court have frequently recognized, does not clearly distinguish between unconstitutional and constitutional activities, has yielded inconsistent results in both this Court and the lower courts, and has engendered substantial confusion among government actors attempting to conform their behavior to constitutional precepts. *Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141, 2150 (1993) (Scalia, J., concurring in judgment) (collecting cases); *Wallace*, 472 U.S. at 106-114 (Rehnquist, J., dissenting). At a minimum, the *Lemon* test is inherently incapable of distinguishing between constitutional and unconstitutional government programs, particularly when

those programs are efforts at accommodation. Since *Lemon*, literally construed, prohibits all state actions with a "religious" purpose or effect, it is incapable of identifying which religious purposes and effects are consistent with the First Amendment – although this Court's precedents plainly establish that some religious purposes and effects are permissible.

This problem is compounded by the fact that, with all respect, this Court's decisions recognizing an accommodation "exception" to *Lemon* are internally inconsistent and provide no guidance on which government efforts to relieve religious burdens should be condemned as "fostering" religion or praised as "accommodating" it.¹⁰ For these reasons, we believe the Court's Religion Clause jurisprudence would be greatly aided by a mode of analysis that does not blindly condemn government efforts to "advance" religion, but focuses directly on whether the particular advancement is of

¹⁰ For example, in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), this Court struck down a statute requiring employers to excuse employees for Sabbath observance, but similar accommodations required by Title VII are seemingly permissible under the Establishment Clause. *See id.*, 472 U.S. at 711-12 (O'Connor, J., concurring); *TWA v. Hardison*, 432 U.S. 63 (1977); *Bowen v. Roy*, 476 U.S. 693, 712 (1986) (opinion of Burger, C.J.). Moreover, in both *Sherbert* and *Thomas*, the Court summarily rejected any Establishment Clause concerns raised by requiring states to pay unemployment compensation solely to employees dismissed because the employer would not accommodate their Sabbath observance (although not to similarly situated employees missing work for non-religious reasons). *Sherbert*, 374 U.S. at 409-10; *Thomas*, 450 U.S. at 719-20. Indeed, the Court in *Sherbert* and *Thomas* held that such accommodation was required under the Free Exercise Clause. Accordingly, this Court's precedents establish that a state government is required by the Free Exercise Clause to accommodate an employee's Sabbath observance by providing him unemployment compensation, but the same government is precluded from accommodating all (but perhaps not some) employees' Sabbath observance by the Establishment Clause. Finally, of course, if the religious tenet creating the conflict with work responsibilities is not Sabbath observance, but religiously-motivated peyote use, the State has no obligation either to accommodate that employee or to pay him unemployment compensation when dismissed. *See Smith*, 494 U.S. 872.

the sort that gives rise to the harms the Establishment Clause was designed to prevent. As we have noted, the overriding concern of both the Establishment Clause and Free Exercise Clause was to further religious liberty by protecting individuals against government efforts to interfere with religious practices or influence private religious choices. Accordingly, a law or government program which "advances" religion by facilitating or accommodating a religious practice is fully consistent with the values of the Establishment Clause, while one which induces or coerces such a practice is not.

An Establishment Clause test that focuses on the autonomy of the private citizen would not only bring coherence to accommodation issues, but would also shift the general Establishment Clause inquiry away from amorphous and sometimes metaphysical assessments of legislators' motives and "symbolic effects." *County of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Wallace*, 472 U.S. at 108-09 (Rehnquist, J., dissenting). More importantly, as we presently show, it is the only understanding of the Establishment Clause which is consistent with either the Nation's long-standing traditions or the original understanding of that Clause. Accordingly, we believe the Court should abandon the *Lemon* analysis and adopt the doctrine seemingly endorsed by five members of the Court over the past several terms, although not adopted in a majority opinion – i.e., the principle that some government coercion is a necessary element of an Establishment Clause violation. See *Lee*, 112 S. Ct. at 2678 (Scalia, J., dissenting, joined by Chief Justice Rehnquist, and Justices Thomas and White); *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in the judgment and dissenting in part).

The Establishment Clause had its intellectual and political origins in the beliefs and deeds of James Madison and Thomas Jefferson, and it is their joint struggle against Patrick Henry's proposal to enact in Virginia "A Bill Establishing A

Provision for Teachers of the Christian Religion" ("Assessment Bill")¹¹ that most poignantly illumines the meaning of that Clause. The mandatory Assessment Bill, if enacted, would have permitted the taxpayer to designate which Christian church would receive his payment, and in default of a designation, the taxes would be paid into a public fund to aid "seminaries of learning." *Everson v. Board of Educ.*, 330 U.S. 1, 36 (1947) (Rutledge, J., dissenting). It was in response to this proposal that Madison penned his justly acclaimed *Memorial and Remonstrance Against Religious Assessments*. See L. Levy, *The Establishment Clause* 55-58, 101-04 (1986).

Madison's avowed reason for drafting the *Memorial and Remonstrance* was to combat the Assessment Bill, which he believed would be a "dangerous abuse of power" if "armed with the sanctions of a law." 8 *The Papers of James Madison* 298 (1973) (*Memorial and Remonstrance*). Pervading Madison's argument against the proposal is the theme that the Assessment Bill was offensive because it was coercive. He wrote, for example, that the Bill violated "the fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, *not by force or violence*.'" *Id.* para. 1 (emphasis added). "[C]ompulsive support" of religion, he stated, is "unnecessary and unwarrantable." *Id.* para. 3. He warned that "attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general," and that a government "which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." *Id.* para. 3 (emphases added).

¹¹ The text of the Assessment Bill appears as an Appendix to Justice Rutledge's dissenting opinion in *Everson v. Board of Educ.*, 330 U.S. 1, 72-74 (1947).

For Madison, the evil of the Assessment Bill was its proposed use of government power to coerce support of religion, which he understood to be the *sine qua non* of an establishment of religion. The *Memorial and Remonstrance* was instrumental in defeating the Assessment Bill, and in the wake of that defeat, Virginia enacted Jefferson's "Act for Establishing Religious Freedom." The central passage of that legislation echoes Madison's preoccupation with the role of government coercion:

[T]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

12 Hening's Stat. 86 (W. Hening ed. 1823). Thus, to Jefferson, as to Madison, the essential concern was to prevent the government from using its coercive powers to inhibit religious liberty.

Madison's comments during the congressional debates on the Establishment Clause itself sound the same theme he and Jefferson had voiced in their fight against the Assessment Bill. According to Madison, the language of the Clause meant that "Congress should not establish a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." *Wallace*, 472 U.S. at 95 (Rehnquist, J., dissenting) (quoting 1 *Annals of Cong.* 730 (J. Gales ed. 1789) (emphases added)). The Clause was necessary, Madison remarked, because "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." 472 U.S. at 96 (quoting 1 *Annals of Cong.* 731 (J. Gales ed. 1789) (emphasis added)). Again, coercion was understood to be the very essence of an establishment of religion.

Indeed, one is hard pressed to locate a statement concerning nonestablishment by any of the Framers that is not somehow tied to the this overriding concern with governmental coercion or compulsion. It has been argued, however, that the text of the Religion Clauses forecloses making coercion an element of an establishment of religion. Specifically, some argue that making coercion the touchstone "would render the Establishment Clause a virtual nullity . . ." because "laws that coerce nonadherents to support or participate in any religion or exercise . . . would virtually by definition violate their rights to free exercise. . . ." *Lee*, 112 S. Ct. at 2673 (Souter, J., concurring); see also *County of Allegheny*, 492 U.S. at 636 (O'Connor, J., concurring in part and concurring in judgment).

This argument, however, is demonstrably untrue, for an Establishment Clause interpreted to require a showing of coercion would still reach certain governmental actions that are beyond the scope of the Free Exercise Clause. Most obviously, the Establishment Clause – but not the Free Exercise Clause – would protect *non-believers* from coercive governmental action bestowing direct financial aid only on religious institutions or otherwise inducing improper support for religious activity. This follows from the fact that the Establishment Clause is directed at the exercise of governmental activity in favor of religion, while the Free Exercise Clause is directed at governmental prohibitions or burdens to religious belief or practice. To be sure, there are certain governmental actions that will implicate both Clauses under the coercion standard, but this is equally true of the Establishment Clause under the *Lemon* test. Any discrimination in favor of a religion can be challenged, under current doctrine, by the disfavored groups as an interference with their Free Exercise or Establishment Clause rights. This overlapping protection simply reflects the fact that the Religion Clauses, while providing two distinct guarantees, are "correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom." *Everson*, 330 U.S. at 40 (Rutledge, J., dissenting). Thus, a doctrine which reduces the existing "tension between the two Religion Clauses" by

reflecting their common core purpose should be viewed as beneficial, not harmful. *Thomas*, 450 U.S. at 719.

What remains after examining the history and the text of the Religion Clauses are the supposed requirements of *stare decisis*¹² and certain isolated statements from some of this Court's precedents to the effect that "[t]he Establishment Clause . . . does not depend upon any showing of direct governmental compulsion." *Engel v. Vitale*, 370 U.S. 421, 430 (1962); see also *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 786 (1973); see generally *Lee*, 112 S. Ct. at 2671-72 (Souter, J., concurring) (collecting cases); *id.* at 2664 (Blackmun, J., concurring). Despite the fact that this statement from *Engel* was both *dictum*¹³ and flatly inconsistent with this Court's prior Establishment Clause jurisprudence,¹⁴ it has been incorporated into *Lemon*. *Amicus* is thus asking the Court to reconsider *Lemon*, and to adopt instead a test that focuses upon the presence or absence of governmental coercion that might undermine religious liberty. *Stare decisis*, properly understood, presents no barrier to such a holding.¹⁵

¹² See, e.g., *Lee*, 112 S. Ct. at 2673 (Souter, J., concurring) (history supporting coercion argument "do[es] not reveal the degree of early constitutional thought that would raise a threat to *stare decisis* by challenging the presumption that the Establishment Clause adds something to the Free Exercise Clause that follows it.").

¹³ Immediately after disavowing the notion that coercion was an element of an Establishment Clause violation, the Court wrote that "[t]his is not to say, of course, that [school prayers] do not involve coercion. . . . When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 430-31.

¹⁴ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship."); *McCullum v. Board of Education*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952).

¹⁵ It is well-established that "*stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct.

Of course, an Establishment Clause test that focuses on coercion would render constitutionally permissible certain practices that this Court has held to be forbidden by the Establishment Clause. See, e.g., *Aguilar*, 473 U.S. 402 (unconstitutional for public teachers to provide remedial education in parochial schools); *Grand Rapids*, 473 U.S. 373 (same). The same must be said, however, about any principled and consistently applied Establishment Clause test, for this Court's Religion Clause precedents simply cannot be explained by any single analytical principle. This includes, of course, *Lemon* itself, which the Court has not hesitated to discard when, for example, it conflicts with the accommodation principle, see, e.g., *Corporation of Presiding Bishop*, 483 U.S. 327, or when its application would otherwise require the Court to invalidate a practice in the face of overwhelming historical evidence that the practice is constitutionally permissible. See *Marsh v. Chambers*, 463 U.S. 783 (1983). A test that consistently yields such inconsistent results is entitled to only minimal precedential value.

For the reasons already discussed, *amicus* believes that, to the extent this Court's rulings support that notion that the Establishment Clause can be violated absent some showing of governmental coercion, those rulings are unsound. The decision of the Court of Appeals of New York in the present case also shows how this Court's rulings have failed to provide lower courts with meaningful guidance in the often difficult

2791, 2808 (1992) (opinion of Justices O'Connor, Kennedy, and Souter) (quoting *Burnet v. Coronado Oil Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)); see also *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-10 (1991); *id.* at 2617 (Souter, J., concurring). Reexamination of constitutional precedents is warranted, at a minimum, when those decisions have generated uncertainty and failed to provide guidance to lower courts, for "correction through legislative action is practically impossible," *id.* at 2610 (internal quotation marks omitted), and "when it becomes clear that a prior constitutional interpretation is unsound. . . ." *Planned Parenthood*, 112 S. Ct. at 2861 (Rehnquist, C.J., dissenting).

task of distinguishing between unconstitutional establishments of religion and permissible accommodations to religious beliefs and practices. That Court, professing allegiance to this Court's precedents, applied a highly subjective and endlessly manipulable test to Chapter 748, and concluded that the New York State Legislature may not constitutionally accommodate the genuine religious practices and beliefs of the Satmar residents of Kiryas Joel.

An Establishment Clause test anchored by some requisite showing of governmental coercion would clearly have produced a different result. Simply stated, Chapter 748 has no coercive effect – subtle or overt, direct or indirect – on anyone. While it is surely the case that religious accommodations may at times also include impermissibly coercive governmental involvement, this is not such a case. Chapter 748 is, in other words, all accommodation, and the Establishment Clause, properly understood, presents no obstacle to its enactment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of New York should be reversed.

Dated: January 21, 1994

Of Counsel:

W. PATRICK DONLIN
CARL A. ANDERSON
KNIGHTS-OF COLUMBUS
One Columbus Plaza
New Haven, CT 06510
(203) 772-2130

Respectfully submitted,

WILLIAM P. BARR*
MICHAEL A. CARVIN
WILLIAM L. MCGRATH
SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Counsel of Record